FREE COPY

Office - Supreme Court, U.
FILED
JUL 28 1948
CHARLES ELMORE CROPL
CLER

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 124

PAULINE RINN, as Executrix of the Estate of Walter P. Rinn, deceased, CHARLES F. POGGE and RAYMOND C. POGGE,

Petitioners,

vs.

BROADWAY TRUST AND SAVINGS BANK, JUSTIN J. JAEGER, Receiver, ARTHUR G. STRASSHEIM, Liquidator, et al.,

Respondents.

REPLY OF JUSTIN J. JAEGER, RECEIVER OF BROADWAY TRUST AND SAVINGS BANK, TO PETITION FOR WRIT OF CERTIORARI.

HECTOR A. BROUILLET,
208 S. La Salle Street,
Chicago, Illinois,
Attorney for said Respondent.

Scheffer Printing Company, Del. 7171

INDEX

PAGE

Argument 1-13

SUMMARY OF ARGUMENT

There is no Federal question herein involved 1-13

The two decisions of the Appellate Court are entirely consistent. The two decisions when construed together hold that when a bank has paid all of its obligations (depositors and general creditors) that the Auditor of the State of Illinois has no jurisdiction of the bank, and its stockholders can have relief with reference to the remaining assets of the bank, but when there are existing creditors of the bank whose claims arose out of the general business of the bank, the Auditor has jurisdiction so long as those creditors remain unpaid 1-3

This is but an application of the familiar rule of law that stockholders of a corporation have no rights until creditors are paid 2

II.

THE STATUS QUO ORDERS.

(a) The orders questioned by petitioners were not entered in violation of the *status quo* order. All parties to the litigation acted as if said *status quo* order had not been entered 3-4

(b) The claims filed, irrespective of their allowance, showed that the bank was indebted upon various commercial accounts, even if there were no depositors' claims 4-5

(c) When it appeared as a matter of fact that there were commercial claims due from the bank, the right to dissolve the corporation and distribute its assets was vested exclusively in the State Auditor under section 11 of the Banking Act 5-6

PAGE

III.

THE CLAIMED MISMANAGEMENT OF THE RECEIVER.

(1) The findings in the order as to the financial statement of the debtor, Nikopoulos, showing assets of $1550.00 and liabilities of $19618.83, justify the compromise approved by the court 7

(2) There is no fraud alleged or proven on the part of the receiver in recommending the acceptance of the offer of $6250.00 which was paid in full 7

(3) No claim of mismanagement can be sustained successfully in view of the findings of fact set up in the order of the court approving the compromise 7

IV.

THE CLAIMED COLLUSION.

The testimony of Doheny, a witness for petitioners, shows that there were no irregularties in the handling of the bank's books and records. It also shows that there was no collusion as claimed by petitioners 7-9

V.

THE RECEIVER'S ACCOUNT.

The question of the receiver's account is still pending before the trial court. The contention that all of the receiver's disbursements were illegal depends upon the question of whether the court had the power to appoint a receiver. The law on this question is well settled 9, 10

VI.

The points raised under point VI of counsel's petition all depend upon the jurisdiction of the court in the Auditor's case. The points of this question have already been set forth 10, 11

VII.

The Auditor cannot be barred by laches or acquiescence with reference to his rights under Sec. 11 of the Bank Act 11

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 124

PAULINE RINN, as Executrix of the Estate of Walter P. Rinn, deceased, CHARLES F. POGGE and RAYMOND C. POGGE,

Petitioners,

vs.

BROADWAY TRUST AND SAVINGS BANK, JUSTIN J. JAEGER, Receiver, ARTHUR G. STRASSHEIM, Liquidator, et al.,

Respondents.

REPLY OF JUSTIN J. JAEGER, RECEIVER OF BROADWAY TRUST AND SAVINGS BANK, TO PETITION FOR WRIT OF CERTIORARI.

I.

There is no Federal Question Here Involved.

If petitioners had fully set forth the facts on which the two decisions of the Appellate Court were based, it would be apparent that no Federal question was here involved.

The first appeal to the Appellate Court involved a construction of the allegations of the complaint filed as to whether a cause of action was set up. The Appellate Court on the second appeal in commenting on its decision in the first appeal, said

> "Our decision is the law on this appeal, if the evidence on the trial established the facts alleged in the

> pleadings then before us. These facts, as stated (p. 381), were that the bank had not been doing a banking business for nearly ten years and that the depositors had been paid and every obligation that had arisen out of its banking business had been satisfied."

The Appellate Court in its first opinion held that under the above facts, if proven, the petitioners were entitled to relief. The court construed Section 11 of the Banking Act not to be applicable when all of the depositors of the bank had been paid in full and every obligation that had arisen out of its banking business had been satisfied. But when the cause came on for hearing after the remanding order of the Appellate Court had been filed in the Circuit Court, the petitioners did not prove that all depositors had been paid and every obligation that had arisen out of its banking business had been satisfied, but on the contrary "It was shown conclusively that obligations to general creditors were unpaid when the auditor's suit was instituted and when the amended and supplemental complaint was presented at the time of the trial, after it had been filed pursuant to our mandate". (Opinion of Appellate Court on second appeal. R. 108).

It is thus apparent that the Appellate Court in its two opinions is entirely consistent. When construed together they hold that when a bank organized under the laws of the State of Illinois has paid all of its depositors in full and has also satisfied every obligation that had arisen out of its banking business, that then the Auditor of the State of Illinois has no jurisdiction of the bank but if the bank has general unpaid creditors arising out of its banking business, that said Auditor has jurisdiction over the bank, so long as those creditors remain unpaid. This is but an application of the familiar rule of law that stockholders of a corporation have no rights until creditors are paid.

The net result of these two decisions of the Appellate Court, is that so long as a bank has unpaid creditors, that stockholders (like petitioners) have no right to interfere with the right and power of the Auditor to liquidate the bank under Section 11 of the Illinois Banking Act, but as soon as all creditors of the bank are paid, the Auditor has no further interest in the bank, and stockholders are then entitled to a distribution of the remaining assets of the bank, and, therefore, can maintain a complaint for an accounting from persons who have assets of the former bank in their possession. There is no federal question involved under this situation.

II.

The Status Quo Orders.

Under this point counsel for petitioners urge that the Appellate Court deprived the petitioners of their property rights without due process of law, in violation of the 14th Amendment to the Constitution, when it concluded that the orders which were entered in the Auditor's suit after the consolidation of that suit with petitioner's action, were not assailable collaterally.

(a) The orders questioned by petitioners were not entered in violation of the *status quo* order. All parties to the litigation acted as if said *status quo* order had not been entered.

The claim of petitioners that the orders entered in the auditor's suit with reference to the compromise and the allowance of claims were entered without notice and in violation of the *status quo* order is refuted by the fact that the parties to the litigation acted as if said *status quo* order had not been entered. The Appellate Court in

its first opinion (326 Ill. App. 376) found (p. 380 of opinion):

> "The litigants appear to have forgotten an order theretofore entered that the assets should remain in *status quo.*"

The petitioners were just as much bound as respondents by the finding of the Appellate Court to the above effect. Petitioners have continually insisted that the first opinion is the law of this case. The Appellate Court so found in its second opinion. And petitioners are bound by that finding of the Appellate Court in its first opinion from which no appeal was prosecuted. The Appellate Court in its first opinion did not hold that these orders were assailable because entered in violation of the *status quo* order. The Appellate Court in its first opinion held that all parties had forgotten the *status quo* order. From the above it can be seen that counsel for petitioners entirely disregard the finding of the Appellate Court in the first decision that all litigants appear to have forgotten the *status quo* order and acted as if such order had not been entered. The finding of the Appellate Court in its first opinion shows a waiver of the effects of such order by petitioners.

(b) The claims filed, irrespective of their allowance, showed that the bank was indebted upon various commercial accounts even if there were no depositors' claims.

Upon this question the Appellate Court held in its opinion now before this court that the petitioners' pleading alleged that the bank had not been doing a banking business for nearly ten years and that the depositors had been paid and that every obligation that had arisen out of

the banking business had been satisfied. The Appellate Court said in its opinion

> "The evidence does not sustain the latter allegation. It was shown conclusively that obligations to general creditors were unpaid when the auditor's suit was instituted and when the amended and supplemental complaint was presented and at the time of the trial, after it had been filed pursuant to our mandate."

Therefore, it would make no difference whether the claims were allowed or not allowed so long as it appeared that there were commercial claims due from the bank.

(c) When it appeared as a matter of fact that there were commercial claims due from the bank, the right to dissolve the corporation and distribute its assets was vested exclusively in the State auditor under section 11 of the Banking Act.

The above is held by the Appellate Court in its opinion and the court cited in support of its position

Nelson v. *Toluca State Bank,* 334 Ill. 83.
People v. *Shurtleff,* 353 Ill. 248.
Scalzo v. *Com'l. Trust & Savings Bank,* 239 Ill. App. 330.

As the Appellate Court further said in its opinion, "The receiver appointed by the State auditor was invested with title to all the assets of the bank, including choses in action, and he alone could bring the action which plaintiffs are endeavoring to prosecute." Therefore, the trial court had no jurisdiction of petitioners' suit, because the cause of action was vested exclusively in the receiver appointed in the auditor's suit. Under this condition of fact, it would make no difference whether or not action was taken in the auditor's suit by the entering of orders which violated the *status quo* order, because petitioners had no interest in

that suit through the suit they filed which had no foundation in law. If petitioners were not properly before the court it would make no difference whatsoever as to whether or not action was taken in the auditor's suit. The orders would not be void.

We submit that there is no Federal question here involved and that the Appellate Court was correct in ruling on the other questions involved.

III.

The Claimed Mismanagement of the Receiver.

On this point counsel say that the receiver held two notes, one for $2280.82 dated March 28, 1934, and another for $16,238.09 dated February 26, 1939, and that the receiver filed a petition seeking a compromise of the debt evidenced by these notes for $6250.00. This compromise was authorized by an order of the court entered on July 17, 1944. This order finds "that upon the investigation, the receiver caused the debtor to sign a sworn financial statement and as a result of the receiver's investigation it was ascertained that George Nikopoulos was employed as a real estate broker and earned during the past year $2,600.00, that the debtor has assets totaling $1,550.00, and liabilities of $19,618.83; that the main assets consist of certain stocks which according to the debtor he proposed to sell in order to make the $750.00 down payment offered in compromise; that taking into consideration the nature of the debtor's employment it can be seen that garnishment proceedings could not be readily effected; and that according to the financial status reflected by the sworn statement of the debtor it is indicated that a better liquidation could not be obtained if the matter is further pressed" (Abst. 3, 4).

Under this condition of the record our answer to the claim of mismanagement by the receiver with reference to this item is as follows:

(1) The findings contained in the order as to the financial statement of the debtor showing assets of $1,550.00 and liabilities of $19,618.83 show insolvency and justify the compromise approved by the court, and no claim of mismanagment can be sustained successfully in view of the findings of fact set up in the order of the court approving the compromise.

(2) There is no fraud alleged or proven on the part of the receiver in recommending the acceptance of the offer of $6,250.00, which was paid in full.

(3) The receiver is protected by the order of the court authorizing the making of the settlement.

It has been expressly decided by the Appellate Court that payment of money or action by a receiver pursuant to an order of court is sufficient protection, and that expenditures made or action taken in pursuance of such orders cannot be questioned on the receiver's accounting. This was decided in the case of *Reardon* v. *Youngquist,* 189 Ill. App. 3, at p. 12, and this decision was confirmed and followed in the case of *Chicago Title & Trust Co.* v. *Hotel Corp.,* 300 Ill. App. 200.

IV.

The Claimed Collusion.

Under this heading counsel for petitioners contend that the suit of the auditor was collusive as shown by the admissions in the pleadings and by the demurrer to the evidence.

On this question the Appellate Court found in its second opinion:

> "Plaintiffs complain of collusion between the defendants and the State Auditor resulting in the appointment of the receiver by the State Auditor and the bringing of his suit. Undoubtedly this action was taken at the suggestion or request of defendants. It was in the discharge of the duties imposed on the auditor, and no improper, irregular or prejudicial conduct of the State Auditor or of his receiver is shown."

Plaintiffs' witness Frank P. Doheny absolutely refutes the claim of counsel about the destruction of records. This witness is a public accountant and testified that he examined certain books and records of the bank and of the receiver at the request of the attorneys for the plaintiffs; that the books indicated the same balance as shown on plaintiffs' Exhibit 42 for identification (which is headed Statement of Condition of Broadway Trust and Savings Bank of December 31, 1934); that the books did indicate the same balances as shown on that exhibit; that they had attempted to check as to what happened to the assets of the bank and to gather the difference between the apparent net worth of the bank as of December 31, 1944, and the apparent net worth as of June 30, 1935, as shown by the books and that he attempted in a rough way to account for the difference without verifying the books; that the books indicated that a larger portion of the difference was due to loss on liquidation of assets; that they endeavored to check as to some of those assets; that they examined the ledger books, a liability ledger; that he believed the bank called it a journal; that they also examined the debit and credit tickets, which are originating sources of entry and are actually part of the book, although not bound as

such and probably miscellaneous; that they examined them in the office of the receiver, in the office of the Auditor of Public Accounts and a few odds and ends at the closed bank; and that Mr. Jaeger (the receiver), gave them the books (Abst. 70, 71).

In the face of this testimony how can counsel claim that the receiver *destroyed the records.* All that was destroyed was some old depositors' records which had nothing to do with an accounting as to the assets of the bank.

The testimony of their own auditor shows that petitioners have had a complete examination of the books and records of the bank, and they do not point to any material records which were not placed at their disposal.

V.

The Receiver's Account.

Under this heading petitioners contend that the overruling of the objections to the receiver's account and the dismissal of the suit was palpably erroneous, and it was the duty of the Appellate Court to reverse the order.

The objection made by plaintiffs to the report of the receiver was on the ground that "all the disbursements were illegal and void." Counsel in face of their claim that all disbursements of the receiver were illegal and void state that the "burden to justify the distribution was cast upon the Auditor and the Receiver". Under this condition of the record plaintiffs cannot here reverse their position and object to the various items expended, upon the merits of the expenditures. No question was raised by plaintiff in the trial court as to the merits of the expenditures. At Abst. 95 in referring to the receiver's report the court stated that if there was to be a hearing on the objections to the receiver's report that he would

send the case to a master. Mr. Abrams then stated that it was not a question of accounting; that it was a question of an objection to a receiver's report on legal phases and that that question should not go to a master, that it was a matter for a judge to decide, and the court then stated that he had ruled on the legal objections to the fees but not on the reasonableness (Abst. 95).

It follows that counsel for plaintiffs cannot here raise the question as to whether the receiver (as stated by counsel) "who defied the court, destroyed the books and records with knowledge that these books and records were wanted to prove plaintiffs' case is *not entitled* to a reward, nor is his attorney entitled to compensation." This contention goes beyond the question passed on by the trial court and is not here reviewable because the trial court did not pass on the question as to the reasonableness of these fees but entered an order referring same to a master in chancery for a report on the question.

VI.

Answer to Point VI.

On page 36 of their petition counsel make the point that it was the duty of the chancellor to default the bank and the Auditor and to enter a decree *pro confesso* against them, to discharge his receiver, to vacate all orders in the Auditor's suit, to dismiss it for want of jurisdiction and bad faith, and to enter an interlocutory decree for accounting against the other defendants, and that the decree dismissing the complaint should be reversed with directions from this court to enter such a decree on the admissions in the pleadings independent of the oral testimony.

From the argument and points made by counsel in their brief, it is apparent that the whole argument of counsel

as to any claimed liability of the receiver is based upon the contention that the circuit court had no jurisdiction of the auditor's suit. If the court had such jurisdiction then the orders entered in the auditor's suit would not be void and no accounting could be awarded against the receiver.

We have already pointed out that the Appellate Court held in its two opinions that if all debts of the bank were paid that the Auditor had no jurisdiction to appoint a receiver under Section 11 of the Banking Act, but did have jurisdiction if there were unpaid debts of the bank at the time the Auditor filed his liquidation suit. Counsel for petitioners completely ignore the plain language of the two opinions and attempt to mislead by stating that the two opinions are contrary to each other. The two opinions are entirely in accord with each other, and petitioners' whole presentation is based on that false premise. When that situation is understood, then petitioners have no ground on which to base their claim.

VII.

The Auditor cannot be barred by laches or acquiescence with reference to his rights under Sec. 11 of the Banking Act.

Long v. *Farmers & Merchants State Bank,* 300 Ill. App. 426, 433, 434.

Lorimer v. *Rosehill Cemetery Co.,* 325 Ill. App. 258.

CONCLUSION.

The record here shows that while all depositors of the bank were paid that there still remain unpaid and have remained unpaid since the closing of the bank, commer-

cial creditors whose claims have not been paid. The record of the auditor's suit shows that certain claims have been allowed therein and that they remain unpaid.

In order to hold that the circuit court of Cook county had no jurisdiction of the auditor's suit and that the appointment of the receiver by the auditor was void *ab initio,* it would be necessary for this court to determine as a matter of law

(a) that the right of appointing a receiver conferred upon the auditor by section 11 is barred when there is a voluntary liquidation in progress under section 15 of the Banking Act;

(b) that the powers conferred by section 11 of said Act only apply when there are depositors of the bank unpaid;

(c) that the auditor cannot proceed to liquidate a bank and procure a dissolution of a banking corporation when there are only involved the rights of unpaid general creditors (not depositors) and stockholders of the bank to be determined;

(d) that sections 11 and 15 of the Banking Act, when construed together, must not be reconciled but that once any action is taken under section 15 of the Act that section 11 can no longer be invoked;

(e) that the provisions of the General Incorporation Act are applicable to banking corporations, and not the provisions of the Banking Act, once the provisions of section 15 of the Banking Act have been invoked;

(f) that when the provisions of section 15 have been invoked the auditor loses his rights under section 11, even though the creditors (not depositors) and stockholders of the bank come into controversy with respect to the settlement of the affairs of the bank.

We submit that the petition for certiorari should be denied.

All of which is respectfully submitted.

HECTOR A. BROUILLET,
Attorney for Justin J. Jaeger,
Receiver, Respondent.